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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1233

TEXAS MORTGAGE COMPANY,

Petitioner,

v.

PHILLIPS PETROLEUM COMPANY and
PHILLIPS PIPE LINE COMPANY,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

PHILLIPS PETROLEUM COMPANY and PHILLIPS PIPE LINE COMPANY, Respondents, file this Brief in Opposition to the Petition of TEXAS MORTGAGE COMPANY for Writ of Certiorari.

OPINIONS BELOW

The opinion of the Fifth Circuit in this cause is found at 470 F.2d 497 (1972).

QUESTIONS PRESENTED

The Petition of Texas Mortgage fails to present any question for consideration by this Court because:

POINT I

The courts below rendered judgment in accord with controlling Texas law. Petitioner's real complaint is that the courts below did not construe Texas law as does petitioner.

POINT II

The Texas law and Rule 804 do not require entry of judgment demanded by petitioner.

POINT III

The courts below properly disposed of this case under Texas law without ever reaching a consideration of Rule 804.

STATEMENT OF THE CASE

This cause was removed to the Federal Court on diversity of citizenship. This case, as is apparent from a reading of the opinions below, presented the question of the right of Phillips to lay a pipe line under the easements involved. Contrary to Petitioner's Statement (Petition, p. 3) this case was not tried below as a Texas trespass to try title case. Petitioner, in the District Court, pleaded three alternative counts in his Third Amended Complaint (Appendix infra, p. 1a). The first five paragraphs of that complaint plead the Texas form of trespass to try title, but the pleading did not stop there. Paragraph VI plead an estoppel, and Paragraph VII plead the construction of the pipe line by Phillips amounted to a taking of private property, and prayed for damages for such taking. It was this measure of damage, considering the pipe line as constructed to be a taking of property, that was submitted to the jury and awarded to Petitioner by the judgments below.

The Petitioner conveyed the lands involved in this litigation after suit was filed, and the Grantee of that deed declined to intervene in this suit. That deed is reproduced in the appendix (infra, p. 7a). By that deed, Petitioner, Texas Mortgage, conveyed all of its rights in the land here concerned, reserving only the rights embodied in a reservation reading as follows:

> ". . . grantor . . . reserves . . . the right to prosecute Cause No. 67-G-19. . . . Phillips Petroleum Company is alleged to have constructed a pipe line across Tract No. 1, above described, without proper authority. Grantors right to sue and recover for any and all residual damage to the market value of the remainder of said Tract No. 1 occasioned by construction of said pipe line or pipe lines shall in no way be affected by this conveyance."

This "damage to the market value of the remainder of Tract No. 1" was submitted to the jury (Special Interrogatories 10 and 11, Petitioners Brief, p. 23a) and awarded to Petitioner by the judgments below.

POINT I

The courts below rendered judgment in accord with controlling Texas law. Petitioner's real complaint is that the courts below did not construe Texas law as does petitioner.

The Courts below decided this case as one governed by Texas law on the matters here considered and in accord with controlling Texas law. A mere reading of the opinions below lead inescapably to this conclusion.

The opinion of the District Court very clearly expressed the Court's awareness of the fact that Texas law was the controlling law, for the District Court said in Footnote 3:

> "No Texas decisions on this point have been found. The logic of the authorities cited above persuade this court that the Texas courts would follow them in an appropriate case and therefore they are adopted here." (Petitioner's Brief, p. 6a)

While this statement was made concerning a different aspect of the case than the one now presented to this Court, it demonstrates that the Courts below were well aware that this case should be decided ". . . precisely as the state courts ought to do." *Hinde* v. *Vattier*, 30 U.S. (5 Pet.) 398 (1831). Thus, the simple and complete answer to Petitioner's application is that judgment below was rendered in accord with Texas law. A look at the Texas cases cited by Petitioner.

In Petitioners Footnote 3 (Petitioner's Brief, p. 5), the Petitioner cites *Smith* v. *Olson*, 46 S.W. 631 (1898), *Mealy* v. *Lipp*, 42 S.W. 544 (1897) and other Texas cases for the proposition that the Courts below were mislead as to the effect of Petitioner's conveyance *pendente lite*. It is submitted that it is Petitioner, not the Courts below, who misinterprets these cases. The crux of the matter decided by these cases is, from *Smith* v. *Olson* cited in the opinion below:

> "Hence, where the title of the plaintiff is conveyed while the suit is in progress, it proceeds in his name for the *benefit of the purchaser.*
> (emphasis supplied)

After citing this extract from *Smith* v. *Olson*, the Court below said:

> "On the face of it then the litigation had to proceed for the benefit of the State of Texas. The State however, declined to intervene in the litigation."

Petitioner misconstrues the cited cases by ignoring the words "for the benefit of purchaser" in the citation from

Smith v. *Olson,* and is actually here seeking a judgment for itself that would *deny the rights of its grantee.* The cited cases do hold that once litigation is properly commenced, jurisdiction of the Court is not ousted by a conveyance of one by the parties, but the cases cannot be construed to require the entry of a judgment contrary to the facts developed by the record. The judgment below gave Petitioner all of the relief to which it was entitled, and the cited cases will not support any contention that Petitioner is entitled to any other relief.

POINT II

The Texas law and Rule 804 do not require entry of judgment demanded by petitioner.

Petitioner's complaint here is that Rule 804, Texas Rules of Civil Procedure require the entry of judgment as demanded by Petitioner. To construe Rule 804 as does Petitioner is to strain mightily to warp words unto unnatural meanings to arrive at a conclusion that does violence to common sense.

This record reflects that on May 3, 1967, Petitioner, Texas Mortgage, conveyed the land in question to Texas Board of Corrections, (Def. Ex. 7, infra p. 7a) so that thereafter Petitioner had neither title nor the right to possession of said land, since both title and the right to possession was thereby vested in the Grantee. As noted in the opinions below, the Grantee declined to intervene in this litigation.

Petitioner is here insisting that Rule 804 requires this Court to enter judgment for Petitioner for title and possession of a tract of land when this record affirmingly shows that Petitioner has neither title nor the right to possession of such land. Rule 804 simply cannot be construed to reach such an absurd result. Even Petitioner admits that no Texas

court has ever so construed this rule (Petitioners Brief, pp. 4, 6).

Rule 804, read in the context of the rules preceeding it, simply provides that the Court will enter the judgment required by the facts of the particular case, or in the words of the rule ". . . as the case may be. . . ." On this record Petitioner is simply not entitled to such a judgment.

POINT III

The courts below properly disposed of this case under Texas law without ever reaching a consideration of Rule 804.

"Trespass to try title is a statutory action and serves the purposes of the common law action of ejectment in this state. It is the only formal civil action known to Texas law." 56 Tex.Jur.2d 57. Rule 783, Texas Rules of Civil Procedure, sets out the requisites for the petition in a trespass to try title action, and "[a] petition alleging nothing more than is prescribed by this rule is sufficient, even though the allegations be fictitious." 56 Tex. Jur.2d 188. But the formal proceeding is hedged about by rules, and the action is no longer a trespass to try title action if plaintiff specially pleads his title, or any other matter.

> "The plaintiff, if he elects to do so, may specially plead his title. In this event, except as to a special plea of title by limitation, when the specific allegations consist of matters that would have been admissible under the formal count the plaintiff is bound by the title relied on in his special plea, and he may not thereafter resort to the statutory action or rely on his formal plea of trespass to try title."
>
> 56 Tex. Jur. 2d 197.

In this case Petitioner plead other matters, thus changing the case to an action other than a formal trespass to try

title. Once the action becomes something other than the formal trespass to try title, the rules governing the formal action give way to rules governing common law actions and Rule 804, and other rules pertaining only to the formal trespass to try title action are no longer applicable.

Petitioner admits in his brief that no Texas court has ever construed Rule 804 to reach the result Petitioner does, but this does not mean that the Texas courts have not decided a case in point. In *Texas Electric Service Co.* v. *Lineberry,* 333 S.W.2d 596 the landowner was faced with a wrongful entry and construction of electric transmission lines. In that case the landowner recovered damages as did Petitioner here, and was held *not* to be entitled to a judgment for title and possession as demanded by Petitioner here. In the words of the Court:

> "Landowners were not entitled to recover full compensation for value of land taken plus damages to the remainder, without at the same time being held to have assented to or acquiesced in the continued use and maintenance of electric transmission line across land by company."

In this case, Petitioner recovered damages for permanent injury to the land by reason of the existence of the pipe line. Having recovered such damages, Petitioner may not also have judgment as demanded here.

In his efforts to find some semblance of support for his contentions, Petitioner in his brief (p. 7) cites *Federal Land Bank* v. *Brooks,* 143 S.W.2d 928 (1940) apparently for the proposition that the judgments below somehow adjudicated title to the land in Phillips. The judgment below is plain and clear and not subject to such construction under Texas or any other law. The judgment below did not render a take nothing judgment against Petitioner, but gave to Petitioner

a judgment fully explained by the trial court's memorandum and order. In *City of Houston* v. *Miller*, 436 S.W.2d 368 (Civ.App. 1968 — n.r.e.) the Texas courts were faced with the problem of interpreting a judgment in a title case, and held:

> "Pleadings of parties may be considered to determine the scope and meaning of a take nothing judgment in trespass to try title. (Headnote 3)
>
> • • • • •
>
> Special pleadings, in addition to formal allegations of trespass to try title, limit the issues of the case and the effect of the judgment therein." at 436 S.W.2d 372.

Contrary to Petitioner's statement, the decided Texas case law clearly recognizes that any judgment, including judgments in formal trespass to try title cases, are interpreted in the context in which they are found. In the case at bar, the Judgment of the Court below, taken in the context of the memorandum and order of the Court, leaves no doubt as to the holding of the Court. The Petitioner's statements as to the unintended effects of the Judgment below are simply without foundation.

As pointed out above, the Courts below gave to Petitioner every relief to which Petitioner was entitled, and decided this case below on applicable Texas law. The question of whether Rule 804 Texas Rules of Civil Procedure was a matter of substantive law so as to be binding on the federal courts was simply not reached. In his brief, Petitioner has assumed this Rule 804 and the Texas Rules governing the formal proceedings known as trespass to try title is substantive law within *Erie* v. *Tomkins*. This assumption by Petitioner is not valid.

These rules governing trespass to try title (Rules 783-809 Texas Rules of Civil Procedure) simply set out the form of pleadings, and the method of raising certain issues

to be tried in a Texas Court, but this is not a matter that is outcome determinative, but it is a matter of procedure similar to that presented in *Hanna* v. *Plumer*, 380 U.S. 460. In *Hanna* v. *Plumer*, in discussing the problem there presented, the Court, in holding the lower Courts properly used the Federal Rules governing service of process rather than Massachusetts rules, used as an example the following:

> "For example, having brought suit in a federal court, a plaintiff cannot then insist on the right to file subsequent pleadings in accord with the time limits applicable in the state courts, even though enforcement of the federal timetable will, if he continues to insist that he must meet only the state time limit, result in determination of the controversy against him. So it is here." at 380 U.S. 468, 469.

The case Petitioner now brings is within the quoted example. The Texas Rules governing trespass to try title only provide for the form in which issues are presented to the Texas Courts, not matters of substantive rights. And in this connection it is to be noted that Petitioner has not relied on any factual showing in the record that would support his claimed right to a Judgment, but relies on the proposition that the form in which the action is brought entitles him to the Judgment here demanded.

The answer to this approach by Petitioner is many fold:

1. Petitioner does not complain that the form of the pleadings below were used to deprive him of any right to try any issues concerning the rights of the parties.
2. The judgments below gave Petitioner every right he was entitled to under Texas law.
3. The Petitioner admits in his brief that the Texas Courts have never construed these Texas Procedure Rules as does Petitioner here.

We submit, therefore, that this Court should refuse the application, and refuse to review these Texas Rules of Civil Procedure, since no question within U.S. Sup. Ct. Rule 19 is presented for review. There is no claimed conflict between local and federal law; and no demonstrated misapplication of local law.

SUMMARY

Petitioner has wholly failed to present any question for review by this Court because:

1. In his brief, Petitioner admits that no Texas Court has ever construed the referred to Texas law and Rules as Petitioner here construes them;
2. The construction of Rule 804 here urged by Petitioner is unreasonable in that it would result in a Judgment contrary to the undisputed facts disclosed by the record, and no Texas Court would so construe said rule.
3. The Judgment below awards to Petitioner all relief to which Petitioner is entitled.
4. The Courts below properly decided the issues presented in accord with applicable Texas law.
5. Petitioner has failed to present any issue for review by this Court within the purview of U.S. Sup. Ct. Rule 19 in that Petitioner does not claim any conflict between local and federal law, and has wholly failed to show any misapplication of local law.

Petitioner has wholly failed to show any error of the Court below. The Petition should be denied.

Respectfully submitted,

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By E. H. BROWN

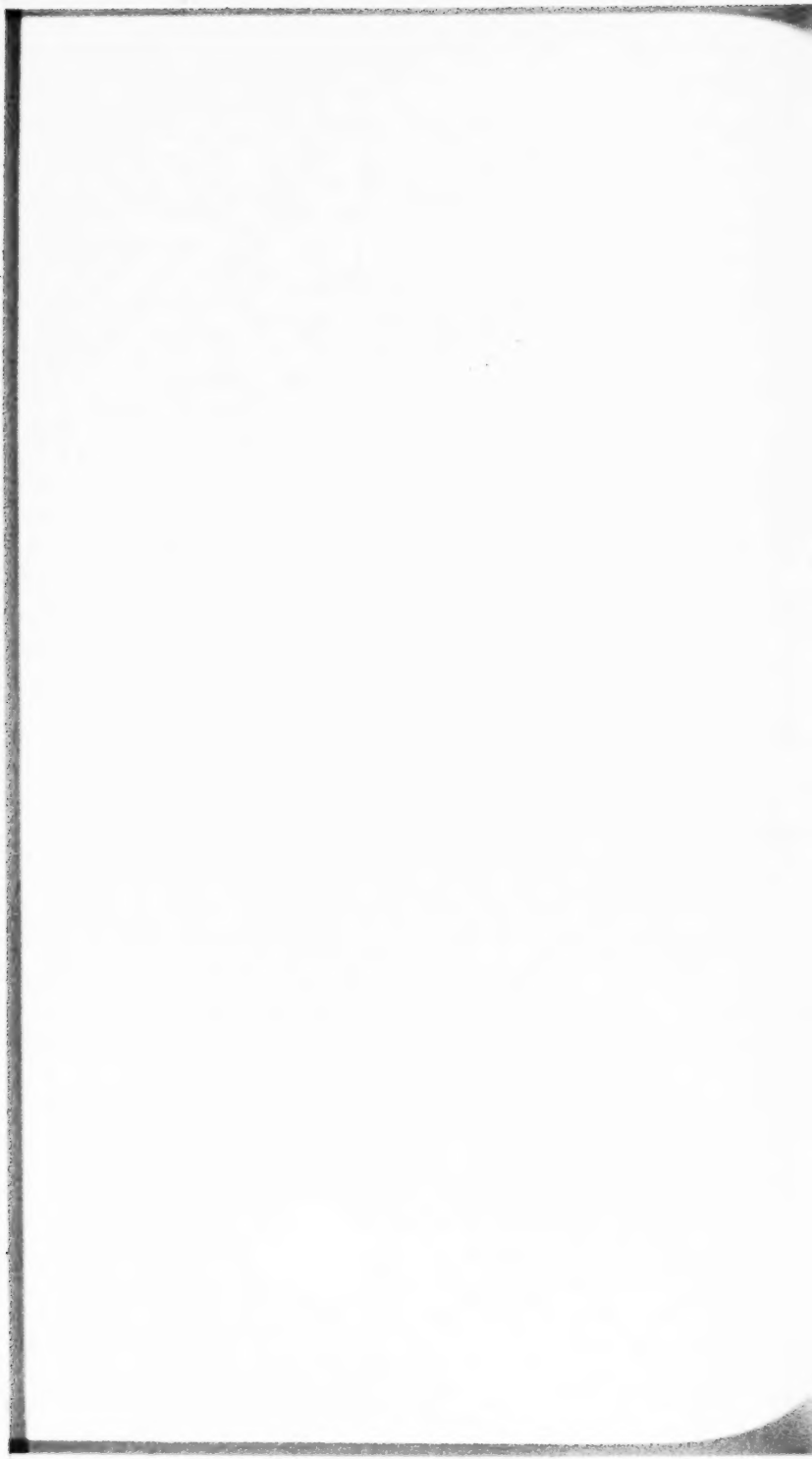
Attorneys for Respondents

CERTIFICATE OF SERVICE

I hereby certify that service of three (3) copies of the foregoing Brief of Respondents was made on counsel for Petitioner, Joe G. Roady, by depositing the same in a United States post office mail box, with first class postage prepaid, addressed to said counsel at 2500 Two Shell Plaza, Houston, Texas 77002, this the 2. day of April, 1973.

E H Brown

E. H. BROWN



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APPENDIX "A"

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

Civil Action No. 67-G-19

M. W. LEE, ET AL

Plaintiffs,

v.

PHILLIPS PETROLEUM COMPANY AND
PHILLIPS PIPE LINE COMPANY

Defendants.

THIRD AMENDED ORIGINAL COMPLAINT OF TEXAS MORTGAGE COMPANY

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW Texas Mortgage Company, plaintiff in the above entitled and numbered cause, and with leave of Court first had and obtained, files this, its Third Amended Original Complaint and would respectfully show unto the Court the following:

I.

At all matrial times, plaintiff has been the owner of and has had the legal right to possession of all that certain tract of land lying and being situated in Brazoria County, Texas, and being more particularly described as follows, to wit:

150 acres of land, more or less, in the William Harris League, Abstract No. 71 in Brazoria County, Texas, being the same land described in deed from C. S. Reichman, Trustee to H. Paul Korge dated February 5, 1896, recorded in Volume 34 at page 169 of the Deed Records of Brazoria County, Texas.

And plaintiff was in possession of said land and premises and entitled to possession of same.

II.

Defendants assert a claim to an easement right in a portion of the land in controversy which is adverse to plaintiff's title and claim in and to said lands and premises. The defendants prior to the filing of this suit on or about September 2, 1966, unlawfully entered upon and dispossessed plaintiff of said lands and premises and withholds from plaintiff the possession thereof.

III.

Plaintiff would further show that it and those under whom it claims and holds title have had peaceful and adverse possession of the above described lands and premises for more than three (3) years next after defendants' cause of action therefor, if any it ever had, accrued, holding and claiming the same under title and color of title, and plaintiff and those under whom it claims have acquired title to said lands and premises under the three year statute of limitations of the State of Texas which statute is here now specially plead.

IV.

Plaintiff would further show that it and those under whom it claims and holds title have had peaceful and adverse possession of the lands and premises hereinabove described cultivating, using or enjoying the same and pay-

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ing all taxes thereon before they become delinquent, and under a deed or deeds duly registered for more than five (5) years next after defendants' cause of action therefor, if any they ever had, accrued, and plaintiff and those under whom it claims have acquired title to said lands and premises under the five (5) years statute of limitations of the State of Texas, which statute is here and now specially plead.

V.

Plaintiff would further show that it and those under whom it claims and holds title have had peaceful and adverse possession of the lands and premises hereinabove described, cultivating, using or enjoying the same for more than ten (10) years next after defendants' cause of action, therefor, if any it ever had, accrued, and it and those under whom it claims have acquired title to said lands and premises under the ten (10) years statutes of limitations of the State of Texas, which statute is here now specially plead.

VI

By way of further pleading and without waiving any of the foregoing plaintiff would show that in the year 1956, defendants Phillips Pipe Line Company and Phillips Petroleum Company, acting in concert and as a single entity, under threat of eminent domain obtained from plaintiff's predecessor in title, the Korge and Turner interests, then co-tenants, two separate pipeline grants covering said co-tenants' respective undivided one-half interests in the above described property and pursuant thereto jointly proceeded to construct and thereafter to maintain a single pipeline across said property. Subsequent thereto, said defendants together used said pipeline for their common purpose and for a period well in excess of ten years made absolutely no effort to construct nor asserted any right to construct an

additional pipeline across plaintiff's said property. In the year 1966, the said defendant Phillips Petroleum Company for the first time asserted that it had right to locate an additional pipeline across said property and in complete denial and disregard of plaintiff's rights and over plaintiff's strenuous objection moved on to plaintiff's said property and proceeded to construct an additional pipeline at a location selected by it and not agreed to by plaintiff. By reason of the acts and conduct of the said defendants, acting in concert as hereinabove alleged, plaintiff and its predecessors in title were led to believe that said defendants acted as a common entity in obtaining said pipeline grants and that said defendants had fully exercised all rights and claimed no additional rights under said grants and that all parties construed said grants as covering only a single pipeline right-of-way and, plaintiff in good faith relied thereupon, and expended good and valuable considerations for and on behalf of said property and by reason of the construction of said additional pipeline as hereinabove alleged suffered material loss and damage as hereinafter alleged. By reason of the foregoing premises, said defendants are guilty of laches and unreasonable delay and are estopped to assert any claimed right to construct an additional pipeline across said property. Plaintiff would further show that any rights which defendants may initially have acquired with respect to the laying of an additional pipeline extended only to an undivided one-half interest in said property, the said defendants have by their acts and conduct aforesaid, wholly abandoned any and all such rights with respect thereto, including any and all rights to select a location of right-of-way for such additional lines and with respect to an equitable partition of interests between the parties, and have in all respects bound themselves to the terms and provisions of said single pipeline grant.

VII.

Alternatively, plaintiff would show that by reason of the foregoing premises plaintiff has been damaged in an amount in excess of $5,000.00 for that actually taken by defendants and an amount in excess of $20,000.00 as diminution in value of the remainder, and for total damages in an amount in excess of $25,000.00, and plaintiff would further show that the acts of defendants hereinabove set forth amount to a taking of plaintiff's property without just compensation and without due process of law in contravention of the Fifth and Fourteenth Amendments to the Constitution of the United States of America.

VIII.

Further in the alternative, plaintiff would show that prior to the filing of this suit and dispossession of plaintiff by defendant as hereinabove alleged, plaintiff and defendants on or about June 8, 1966, entered into an agreement whereby plaintiff agreed to execute a proposed easement agreement in favor of defendants and to release all claim for damages with respect thereto, and in consideration therefor, defendants agreed to pay to plaintiff the sum of $6,000.00 and thereafter defendants without cause or justification, breached said agreement and refused to consummate same and unlawfully entered upon said lands without plaintiff's permission and dispossessed plaintiff from said lands as hereinabove alleged.

WHEREFORE, PREMISES CONSIDERED, plaintiff prays that it have judgment against said defendants for title and possession of the above described lands and premises and alternatively for damages as hereinabove alleged in the amount of $25,000.00 and alternatively judgment upon the aforementioned agreement in the amount of $6,000.00, with interest upon said amounts as may be just and appro-

priate, and for such other and additional relief either general or special, at law or in equity, which plaintiff may show itself justly entitled to receive.

Respectfully submitted,

Cox, Evans, Pakenham & Roady

By /s/ Joyce Cox

Joyce Cox

By /s/ Frank G. Evans, III

Frank G. Evans, III

By /s/ Joe G. Roady

Joe G. Roady
2828 Gulf Building
Houston, Texas 77002

Attorneys for Plaintiff

APPENDIX "B"

DEFENDANT EXHIBIT NO. 7

STATE OF TEXAS
COUNTY OF BRAZORIA

Know all men by these presents:

THAT Texas Mortgage Company, a body corporate, duly incorporated and doing business under the laws of the State of Texas, acting by and through M. W. Lee, its President, of the County of Harris, State of Texas hereupon authorized by a resolution of the Board of Directors of said corporation as evidenced by a certified copy of such resolution hereto attached, marked "Exhibit A" and made a part hereof, in consideration of the sum of ONE HUNDRED FIFTY-NINE THOUSAND, EIGHT HUNDRED FORTY-EIGHT DOLLARS AND FIFTEEN CENTS ($159,848.15) to it paid by the State of Texas for the use and benefit of the Texas Board of Corrections, the receipt of which is hereby acknowledged does GRANT, SELL and CONVEY unto the said State of Texas for the use and benefit of the Texas Board of Corrections all that certain tract or tracts of land described as follows:

TRACT NO. 1: All that certain tract or parcel of land a part of the William Harris Survey, Abstract 71, Brazoria County, Texas.

Being the same property described as 150 acres, more or less, known as the Bolivar Tract, situated in the William Harris League, Abstract No. 71, Brazoria County, Texas, said land being more particularly described in two (2) deeds, one being from F. S. Turner, et al to M. W. Lee, dated September 1, 1956, recorded in Volume 664, Page 110 of the Deed Records of Brazoria County, Texas, and the other from Elfrieda Korge Howard, et al to M. W. Lee dated February 4, 1957, recorded in Volume 678, Page 464 of the Deed

Records of Brazoria County, Texas, to which deeds and the record thereof reference is here made for a more perfect description.

Being further described by metes and bounds in that certain survey by F. G. Akers, Registered Public Surveyor No. 452, on July 27, 1966.

BEGINNING at the intersection of the center line of Jennings Bayou and the common line of the Stephen Richardson Survey, Abstract 122 and the William Harris Survey, Abstract 71, Brazoria County, Texas. Said beginning point bears West 12,346.12 feet from an old 3" iron pipe found on the Southeast corner of the Texas Department of Corrections 93.39 acre tract. Said 93.39 acre tract being duly recorded in Volume 145, Page 307, Deed Records of Brazoria County, Texas;

THENCE along the center line of Jennings Bayou with the following meanders:

S 23° 40′ W 161.78 feet; THENCE S 06° 58′ W 438.05 feet; THENCE S 01° 38′ W 78.03 feet; THENCE S 13° 14′ E 124.43 feet; THENCE S 25° 50′ E 293.63 feet; THENCE S 16° 28′ E 81.39 feet; THENCE S 08° 56′ E 122.20 feet; THENCE S 08° 52′ W 225.15 feet; THENCE S 52° 25′ W 185.60 feet; THENCE S 72° 27′ W 71.56 feet; THENCE N 71° 21′ W 69.16 feet; THENCE N 82° 54′ W 102.40 feet; THENCE N 69° 52′ W 158.54 feet; THENCE N 41° 55′ W 138.30 feet; THENCE N 34° 34′ W 155.45 feet; THENCE N 24° 48′ W 81.48 feet; THENCE N 58° 26′ W 72.11 feet; THENCE N 39° 25′ W 135.99 feet; THENCE N 79° 14′ W 128.72 feet; THENCE S 78° 15′ W 112.01 feet; THENCE S 46° 16′ W 192.37 feet; THENCE S 43° 25′ W 225.17 feet; THENCE S 48° 31′ W 249.06 feet; THENCE S 56° 32′ W 362.62 feet; THENCE S 23° 47′ W 181.25 feet; THENCE S 71° 00′ W 172.98 feet; THENCE S 21° 58′ W 128.19 feet; THENCE S 63° 33′ E 102.60 feet; THENCE S 20° 32′ E 329.00 feet; THENCE S 05° 20′ E 499.51 feet;

THENCE S 02° 00′ E 376.38 feet and S 04° 30′ W 275.64 feet to the water's edge of the Brazos River;

THENCE in a Northwesterly and Northerly direction along the water's edge of said Brazos River with the following meanders:

N 60° 19′ W 301.00 feet; THENCE 75° 48′ W 401.00 feet; THENCE N 80° 19′ W 912.50 feet; THENCE N 88° 04′ W 808.50 feet; THENCE 41° 58′ W 387.50 feet; THENCE N 22° 33′ E 362.62 feet; THENCE N 42° 41′ E 395.21 feet; THENCE N 52° 11′ E 220.00 feet; THENCE N 54° 03′ E 313.50 feet; THENCE N 69° 28′ E 105.00 feet; THENCE N 48° 45′ E 134.50 feet; THENCE N 49° 49′ E 331.00 feet; THENCE N 44° 41′ E 218.50 feet; THENCE N 36° 55′ E 597.50 feet; THENCE N 5° 04′ E 82.00 feet; THENCE N 33° 17′ E 462.00 feet; THENCE N 3° 45′ E 135.00 feet; THENCE N 20° 22′ W 319.25 feet; THENCE N 52° 28′ W 55.30 feet to the point where the common line of the Richardson and Harris Surveys intersects the water's edge of the Brazos River on the East side of the Brazos River;

THENCE East along the common line of said Richardson and Harris Surveys at 2,612.35 feet past a concrete monument, a total distance of 2,655.67 feet in all to the place of BEGINNING, said tract containing 172.63 acres of land, more or less.

TRACT NO. 2: BEGINNING at a concrete monument on the Southeast corner of Belle Wisdom's 242.56 acre tract (called 250 acres) out of the S. F. Austin Survey, Abstract 25, Brazoria County, Texas, from which concrete monument a 42″ live oak market x bears North 71° 30′ East 59.4 feet and a 40″ live oak marked X bears South 47° 42′ West 118.4 feet; Thence South 89° 45′ 25° West (erroneously called East instead of West in deed description in chain of title of present owner) along the South line of the 242.56 acre tract herein described and the Ramsey Prison Farm line at 5039.09 feet pass concrete monument, at 8583.06

feet pass an iron pipe from which iron pipe a 16″ cottonwood market X bears North 26° East 16.9 feet and a 20″ pecan market X bears North 71° 30′ East 47.0 feet, a total distance of 8700.06 feet in all to the water's edge of the Brazos River; Thence up the Brazos River with the following meanders, North 11° 53′ 30″ East 5.67 feet, North 16° 24′ 19″ East 184.08 feet, North 19° 34′ 14″ East 500 feet, North 32° 09′ 09″ East 46 feet, North 22° 41′ 22″ East 157.05 feet, North 23° 25′ 28″ East 220.08 feet, and North 20° 40′ East 200.89 feet to the Northwest corner of the 242.56 acre tract herein described; Thence East along the North line of the 242.56 acre tract herein described and the South line of Sun Oil Company 66.66 acre tract, at 93 feet pass iron pipe from which pipe a 14″ cottonwood market X bears South 62° 10′ West 25.5 feet and a 14″ sycamore marked X bears North 20° 35′ East 102.2 feet at 1272 feet pass iron pipe, at 5436 feet pass iron pipe, a total distance of 8236 feet in all to an iron pipe for corner; Thence South 1263.88 feet along the East line of said 242.56 acre tract and Ramsey Prison Farm line to the PLACE OF BEGINNING, and being the same property that was conveyed in a deed from Houston Bank & Trust Co. to M. W. Lee dated May 19, 1955, recorded in Deed Book 635, Pages 9-11, of Deed Records of Brazoria County, Texas, and thereafter conveyed by M. W. Lee to Texas Mortgage Company by deed dated October 11, 1961, recorded in Deed Book 804, Page 207 of Deed Records of Brazoria County, Texas, to which deeds and the record thereof reference is here made.

TO HAVE AND TO HOLD the above described premises, together with all and singular the rights and appurtenances thereto in anywise belonging, unto the said State of Texas for the use and benefit of the Texas Board of Corrections and its assigns forever; and the said corporation, grantor herein, does hereby bind itself, its successors and assigns to warrant and forever defend all and singular

the said premises unto the said State of Texas for the use and benefit of the Texas Board of Corrections and its assigns, against every person whomsoever lawfully claiming or to claim the same, or any part thereof.

EXCEPT, HOWEVER, that the grantor herein is not the owner of the oil, gas and other minerals underlying said lands; and said oil, gas and other minerals are hereby excepted from this conveyance; and

FURTHER PROVIDED that the grantor herein reserves, and it is hereby expressly agreed that it shall have for itself and its assigns the right to prosecute Cause No. 67-G-19, styled M. W. Lee, et al v. Phillips Petroleum Company, et al in the United States District Court for the Southern District of Texas, Galveston Division, to a final judgment on the merits of said case. The grantor herein is to be entitled to the fruits of any recovery in said case. Phillips Petroleum Company is alleged to have constructed a pipeline across Tract No. 1, above described, without proper authority. Grantor's right to sue and recover for any and all residual damage to the market value of the remainder of said Tract No. 1 occasioned by construction of said pipeline or pipelines shall in no way be affected by this conveyance. Grantor reserves the right to prosecute or settle said cause of action to the same extent that it could prosecute or settle had this conveyance not been made.

IN WITNESS WHEREOF the said corporation has caused these presents to be signed by its said President, and its common seal to be hereunto affixed by its Secretary, this is the 3rd day of May, 1967.

TEXAS MORTGAGE COMPANY

By M. W. LEE
M. W. Lee, President

ATTEST:
LILLIAN TODD LEE
Secretary
[SEAL]

STATE OF TEXAS }
COUNTY OF HARRIS }

BEFORE ME, the undersigned, a Notary Public in and for said County and State, on this day personally appeared M. W. Lee, known to me to be the person whose name is subscribed to the foregoing instrument, and to be the President of Texas Mortgage Company, and acknowledged to me that he executed the same for the purposes and consideration therein expressed, and the capacity therein stated.

GIVEN UNDER my hand and seal of office this the 3rd day of May, 1967.

HAZEL WALLACE
Notary Public in and for
Harris County, Texas

[SEAL]